TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 203

FRANK LEWIS, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA, CRIMINAL DIVISION, OCTOBER TERM, A. D. 1952

INFORMATION—Filed October 7, 1952

DISTRICT OF COLUMBIA, ss:

Charles M. Irelan, Esquire, Attorney of the United States in and for the District of Columbia, who, for the said United States, prosecutes in this behalf, by William W. Sewell, Esquire, one of his assistants, comes here into Court, at the District aforesaid, on the 7th day of October, in the year of our Lord, one thousand nine hundred and fifty-two, in this said Term, and for the said United States, gives the Court here to understand and be informed, on the oath of one Hugh J. McGee that one Frank Lewis late of the District aforesaid, on the 13th day of December and on diverse other days thereafter in the year of our Lord, one thousand nine hundred and 51 with force and arms, at the District aforesaid, and within the jurisdiction of this Court, Frank Lewis on December 13, 1951 and on diverse other days thereafter during the month of December 1951 in the District of Columbia engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars ($50.00) as imposed by Section 3290 of Internal Revenue C he failed to pay said tax, all in violation of Section 3294(a) Internal Revenue Code: Title 26 U.S. Code Section 3294(a) and Section 2707(a) Internal Revenue Code as made applicable by Section 3294(c) Internal Revenue Code against the form of the statute is such case made and provided, and against the peace and Government of the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf prosecutes for the said United States, in man-
[fol. 2] ner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Frank Lewis in this behalf to

violations of Federal law, to wit, certain sections of the District of Columbia Code, supra, and/or Section 371 of Title 18, U.S.C. In fact, the only persons within the District of Columbia who are required to comply with the provisions of Chapter 27A are those engaged in activities which have been made unlawful by Federal law.

Immediately, therefore, this case receives an entirely different complexion than was presented to the Supreme Court of the United States in the case of United States v. Kahringer, supra. A reading of the Reply Brief for the United States filed with the Supreme Court in that case, particularly pages 13 et seq., confirms this statement. The appellee in the Kahringer case, supra, had urged that the registration provisions of Chapter 27A, supra compelled him to give testimony incriminatory under Federal as well as state laws, citing the Federal lottery laws, 18 U.S.C. 1301, 1302.[1] The United States urged that Chapter 27A could not be said, because of its registration provisions, to be on its face incriminatory under Federal statutes because other types of wagering other than possible violations of the Federal lottery laws were included in Chapter 27A and at most only a small proportion of persons subject to the wagering taxes might have a basis for raising the privilege against self-[fol. 8] incrimination.[1] The United States argued further to the Supreme Court that inasmuch as only a small number of people might have reasonable cause to apprehend danger from complying, there was not created a setting which made the danger of prosecution for violation of the Federal lottery laws reasonably likely and concluded that the required report or return does not call for information which is incriminating on its face.[2] But the contention advanced by the United States in the Kahringer case, supra, I do not believe applies to the present case, for within the District of Columbia it is not any small group who might possibly tend to incriminate themselves by compliance with Chapter 27A, supra, but is every person who engages in any business

[1] Reply Brief for the United States, *United States* v. *Kahringer*, page 13.

[1] Ibid. page 16.

[2] Ibid. page 24.

ister the names of ingredients for which therapeutic effects were claimed with the Department of Health. The plaintiffs contended the ordinance violated their privilege against self-incrimination in that a disclosure of the ingredients would tend to convict them of using improper ingredients in contravention of health laws. Justice Cardozo, in determining that the Fifth Amendment was not violated, said:

> "The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. *He is simply notified of the conditions upon which he may do* [fol. 13] *business in the future.* He makes his own choice. To such a situation, the privilege against self-accusation has no just application." (Italics supplied.)

As will be observed, a dealer in patent medicine who used proper ingredients would be permitted to do business without interference from the Health Department provided he complied with the conditions, namely, a description of the ingredients used. In other words, by complying he would be licensed to engage in the business subject to no Governmental interference contrary to the result if this defendant complied with the provision of Chapter 27A.

In Shapiro v. United States, supra, quoting from Davis v. United States, supra, re certain records required by law to be kept by a citizen, the situation was entirely different than the one posed in the instant case. There the majority held that the Federal Government had the power to regulate the business under the Price Control Act, required certain records to be kept and compliance with the Act licensed the person to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of Governmental regulation. If, as was pointed out therein, the person required to keep the books violates the Act and in making entries the commission of that crime by him is reflected, the criminality of the entries exists by his own choice and election. He would not, if he kept his own books and records and made proper entries, incriminate himself of any other federal act and would be, as has been said previously, licensed to engage in the business without fear of incriminat-

ing himself under some other federal law. Therefore, those cases justifying the requirement of keeping and producing public records because of a licensing or regulatory power are not applicable to this case.

Nor is the treatise by Professor Wigmore which was also cited applicable in the instant case.[1]

> [fol. 14] ". . . The duty or compulsion to disclose the books existed generically, and prior to the specific act; . . . the duty or compulsion is directed to the generic class of acts, not the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty . . ."
> and concluded:
>
> "The generalization, therefore, may be made that there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which is a particular one, may or may not in future be criminal at the choice of the party reporting . . .".

In disposing of the application of Professor Wigmore's statement to the instant case it is clear that the Federal criminal laws involved here antedate Chapter 27A, supra. Further, the duty or compulsion to register and pay the tax is directed to the criminal act and is subsequent to the doing of the criminal act and not prior thereto. When the Supreme Court stated that the appellee in the Kahringer case, supra, was not compelled to confess to criminal acts already committed, it was merely passing on a statute which, when applied to a person who by registering might admit past acts in violation of state law, would not by such registration be admitting past acts in violation of Federal law. I have hereinbefore set forth excerpts from the briefs of the United States in the Kahringer case, supra, for the purpose of showing that the United States repeatedly pointed out to the Supreme Court that there were "at present" no Federal laws prohibiting wagering activities covered by Chapter 27A, supra. Therefore, if it were true

[1] 8 Wigmore (3d Ed. 1940) Sec. 2259(c).

that "at present" there are no Federal laws prohibiting the wagering activities covered by Chapter 27A, this act would, in fact, be prospective in its application. It could then be properly called in futuro. But the fallacy in the argument of the United States when applied to this case is that there [fol. 15] are Federal laws prohibiting in the District of Columbia every type of wagering activity covered by Chapter 27A. Accordingly, in the District of Columbia, the Act applies to past acts in violation of Federal law and is not prospective in its application.

In arriving at the conclusion that Section 3290 applies to past acts and not future acts, it is necessary to review the pertinent provisions of Chapter 27A of the Internal Revenue Code. I can find no single line or word therein which could enable a conclusion other than registration and the payment of the tax required until a person has first engaged in an activity covered by Chapter 27A. An analysis of Chapter 27A will disclose the following:

Section 3290 of the Internal Revenue Code provides:

> "Sec. 3290. Tax.
>
> "A special tax of $50 per year shall be paid by each person *who is liable for tax under subchapter A or who is engaged in receiving wagers* for or on behalf of any person so liable." (italics supplied)

Now, however, in order to understand who is liable for the tax imposed by Section 3290, supra, it of necessity requires a reading of Subchapter (a) of Chapter 274 of the Internal Revenue Code.

Section 3285(d), Title 26 U. S. C. (Chapter 27A of the Internal Revenue Code, subchapter A) defines the persons liable for the tax. That subsection reads as follows:

> "(d) Persons liable for tax.
>
> "Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

[fol. 16] In addition to the definition contained in the statute itself, the Bureau of Internal Revenue has interpreted the meaning of "engaged in business" in Regs. 132, relating to excise and special tax on wagering under Chapter 27A of the Internal Revenue Code, Part 325 of Title 26), Codification of Federal Regalations, and as amended July 16, 1952.

> "SEC. 325.21. Scope of tax . . .
>
> "(b) *A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers* with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers." (italics supplied)

Regs. 132, Section 325.25(a), "When tax attaches" reads as follows:

> "SEC. 325.25. When tax attaches.
>
> "(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor.* In the case of a wager or credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor." (italics supplied)

Quite obviously, therefore, in the light of the statute itself, as well as the interpretation appearing in the Regulations, a person is not liable for the payment of the occupational tax until he has accepted a minimum of one wager but a more reasonable interpretation probably is the one made by the Bureau of Internal Revenue, namely, making it a practice to accept wagers. Until such a practice is shown [fol. 17] there is no liability under Section 3290. The Gov-

ernment has impliedly conceded the accuracy of the statement in the charging portion of the information, supra, wherein it states that it is by reason of such activity, to wit, engaging in the business of accepting wagers, that the defendant was required to register.

It is true that the Bureau of Internal Revenue amended Regs. 132 on July 16, 1952, which now reads in part as follows:

> "Sec. 325.50. *Registry, return and payment of tax.* (a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code . . ."
>
> * * * * * * *
>
> "(c) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may accept wagers on his behalf . . .
>
> "(d) Each agent or employee of a person accepting wagers shall report on Form 11-C the name and residence address of each person (i. e., individual partnership, corporation, etc.) on whose behalf wagers are to be accepted. . . . "

I fail to find any language in Chapter 27A, supra, on which the Bureau of Internal Revenue can rely in support of this amended regulation. I feel the Bureau of Internal Revenue has misconceived the meaning of Section 3271 of Title 26, U. S. C. and has failed to realize that Section 3270 of Title 26, U. S. C. *is not applicable* to Chapter 27A as Section 3292 of Title 26 U. S. C., which incorporated certain

[fol. 18] other sections by reference, omits it. Section 3292 reads as follows:

"Sec. 3292. *Certain provisions made applicable.*

"Sections *3271, 3273(a), 3275, 3276, 3277, 3279,* and *3280* shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply." (italics supplied)

The Bureau of Internal Revenue has drafted Section 325.50, supra, as though Section 3270 had been incorporated by reference. Section 3270 reads as follows:

"Sec. 3270. Registration.

"(a) Requirements. Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place *where such trade or business is to be carried on.* In case of a firm or company, the names of the several persons constituting the same, and the places of residence, shall be so registered." (italics supplied)

But Section 3291, Title 26 U. S. C. which was substituted for the foregoing reads as follows:

"Sec. 3291. Registration.

"(a) *Each person required to pay a special tax under this subchapter shall register with the collector of the district—*

"(1) *his name and place of residence;*

"(2) *if he is liable for tax under subchapter A,* each place of business where the activity which makes him so liable *is carried on,* and the name and place of residence of each person *who is engaged in receiving wagers* for him or on his behalf; and

"(3) *if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A*, the name and place of residence of each such person.

[fol. 19] "(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

"(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required under this section as may be needful to the enforcement of this chapter." (Italics supplied.)

Section 3271 (a) must be read hand in hand with the foregoing sections. It reads as follows:

"Sec. 3271. Payment of tax.

"(a) Condition precedent to doing business. No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor *in the manner provided in this chapter.*" (Italics supplied.)

As stated previously, the interpretation the Bureau has given to Section 3271 (a) is as if that section read "no person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor." However, as will be observed, Section 3271(a) is not so limited but concludes " . . . until he has paid a special tax therefor in the manner provided in this chapter."

Congress did not incorporate Section 3270 by reference. (See Section 3292). In its place it drafted new sections, to wit, Sections 3285, 3290 and 3291, predicating the liability for the tax and requirements for registration on the fact that a person is engaged in the business, not on the premise that he is going to engage in the business. Therefore, the manner provided for in this chapter is to pay the $50 tax by stamp and register when liable for the tax imposed by subchapter A.

I believe that the above interpretation is accurate and that Chapter 27A can be subjected to no other construction

[fol. 20] is made further apparent by reference to the Committee Reports dealing with the wagering tax. The United States in its brief in U. S. v. Joseph Kahringer, supra, stated at page 14 thereof:

> "As we have noted, the Committee Reports state that the occupational tax is an 'integral part' of the plan for collecting the 10 per cent tax on wagers. *The registration provisions are directly related to the enforcement and collection of both taxes.* The taxes affect a large and complex business operated by a class of citizens from whom willing compliance and cooperation are not to be expected. It unquestionably facilitates the collection of a tax on a business to have the person engaged in such business specify his name, address and place of business and the names and addresses of the persons either who carry on the business for him or for whom he carries on the business . . ." (Italics supplied.)

In making that statement the U. S. relied on the statement appearing in H. Report 586, page 60, S. Report 781, page 181, wherein it was stated:

> "The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, *the bill provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify* the persons on whose behalf he is engaged in receiving wagers." (H. Rep. 586, 82d Cong., 1st Sess., p. 60; S. Rep. 781, 82d Cong., 1st Sess., p. 118). (Italics supplied.)

It is thus observed that the Congressional intention was that information demanded by the registration form must be given when the person liable for the tax imposed by subchapter A, appears to pay the $50 occupational tax.

[fol. 21] I believe the information required calls for answers that this defendant could reasonably fear would incriminate or tend to incriminate him of a violation or violations of Federal law. This is all that is required to bring into effect the Fifth Amendment. The most recent enunciation re self-incrimination is in Hoffman v. United States, 71 S. Ct. 814, 818, where the Court said:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (Patricia) Blau v. United States, 1950, 340 U. S. 159, 71 S. Ct. 232 . . ."

Nor should Section 472, Effective Date of Part VII, which is contained in Chapter 27A, supra, be overlooked.[1] As will be observed, the first time a person is liable for the tax imposed by Section 3290 which is incorporated in Subchapter (B) is on the same day that a person engaged in wagering activities within the purview of Chapter 27A first is liable for the 10 per cent tax under Subchapter (A) of Chapter 27A, supra. Certainly, if Congress had intended that the $50 tax and registration should be paid before the acceptance of a wager, it would have so provided in the foregoing "grace period" provision.

Further, the existence of various Treasury Regulations[2] and the policies of the Bureau of Internal Revenue as stated to this court by defense counsel to make the return avail-

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[1] "The tax imposed by subchapter A of Chapter 27A, as added by section 471, shall apply only with respect to wagers placed on or after the first day of the first month which begins more than 10 days after the date of enactment of this Act. No tax shall be payable under subchapter B of Chapter 27A, as added by section 471, with respect to any period prior to the first day of the first month which begins more than 10 days after the date of enactment of this Act. . . ."

[2] Treasury Decision 4929, Sections 463C.32, 463C.33, 463.34. Treasury Decision 5138, Section 458.611.

able to prosecuting officials and not contradicted by the United States lend further basis for the well founded per- [fol. 22] turbation that this defendant has with respect to compliance with Section 3290.

It is obvious that compliance would result in his giving to the United States Attorney in this District the best of proof to go further and prosecute him and others associated with him in the business of gambling in the District of Columbia for violation or violations of the District of Columbia Code as well as Section 371 of Title 18, U. S. C. and Sections 1301, 1302 of Title 18, U. S. C.

One other point was advanced by the United States in its Memorandum, wherein relying on the case of United States v. Sullivan, 274 U. S. 259, it contended that this defendant was not entitled the privilege against self-incrimination in that he had failed to file a return. In this regard the United States pointed out that the majority opinion in the Kahringer case, supra, had likewise made reference to the Sullivan case. The majority opinion states:[1]

> "Appellee's second assertion is that the wagering tax is unconstitutional because it is a denial of the privilege against self-incrimination as guaranteed by the Fifth Amendment.
>
> "Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for. In United States v. Sullivan, 274 U. S. 259, defendant was convicted of refusing to file an income tax return. It was assumed that his income 'was derived from business in violation of the National Prohibition Act.' Id., at 263. 'As the defendant's income was taxed, the statute, of course, required a return. See United States v. Sischo, 262 U. S. 165. In the decision that this was contrary to the Constitution, we are of the opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the

[1] Slip Opinion, page 10, U. S. v. Kahringer.

objection in the return, but could not on that account refuse to make any return at all.' 274 U. S., at 263."

[fol. 23] However, I believe there is a broad distinction between the present case and the facts in the Sullivan case, supra. All that the Sullivan case held was that a person who was a bootlegger in contravention of the National Prohibition Act could not fail to file an income tax return and pay the tax even though the return contained some questions the answers to which might tend to incriminate him. The court in that case said that his procedure was to file the return, pay the tax and then object to answering those questions in the return that might tend to incriminate him. However, that cannot be done under this statute. The statute requires a person who is liable for the 10 per cent tax to pay the $50 occupational tax and register, giving answers with respect to where his place of business is, who his associates are, if any, etc. and such answers will quite obviously incriminate or tend to incriminate him. Nor can the Bureau of Internal Revenue issue a tax stamp unless all the information required by the statute is given and as this court knows the Supreme Court denied certiorari in Combs v. Snyder, 101 F. Supp. 531 (D.D.C.) affirmed 342 U. S. 939, where an individual in this district endeavored to obtain a stamp without giving all the answers required and the Collector of Internal Revenue refused to issue a stamp. In that case a statutory three-man court convened pursuant to Title 28, U. S. C., Section 2282, and refused to aid the applicant in obtaining a stamp on the ground that he came in with unclean hands.

In passing it might be observed that the United States at page 9 of its Memorandum opposing the Motion to Dismiss cites *Combs* v. *Snyder*, supra, as holding the wagering tax law to be constitutional. A reading of the opinion of the United States Court of Appeals for the District of Columbia will disclose that that court did not pass on the constitutionality of the case but denied the plaintiff's motion for preliminary injunction on the ground that a court of equity will deny its aid to one who does not come into court with clean hands. In this regard it should be noted that the

[fol. 24] United States in its brief in the Kahringer case, supra, stated in a footnote a page 9, the following:

> "The *Combs* decision was based primarily on the doctrine of unclean hands and the Government's motion to affirm was based on that principle."

Quite obviously, therefore, this defendant could not pay the tax and file a return without giving answers which would tend to incriminate him due to two reasons, namely, that the statute and registration form require the giving of the answers, and, secondly, the Supreme Court has determined that all the answers called for by Section 3291, Title 26, U. S. C. must be given. Nor could this defendant pay the tax and be in compliance with Chapter 27A of the Internal Revenue Code by merely sending in a check because the Act incorporates by reference Section 3271 which states the only way the tax can be paid, namely, by stamps denoting the tax.

In concluding, with respect to the question of self-incrimination the following comes to the mind of the court. In every instance in the past years that Congress has legislated and required a registration and the payment of a tax prior to a person engaging in a particular activity the payment of the tax involved assured the registrant of freedom from Federal prosecution for engaging in the activity provided he complied with the provisions of the particular act. In the instant case, however, the defendant is told that he must register and pay a $50 tax but not be entitled or licensed to engage in the activities subject to the Act and, further, by such compliance assures himself as positively as he can that he will be prosecuted for engaging in such activities. Accordingly, I believe that a compliance with the registration provisions and payment of the tax required by Chapter 27A, supra, would cause the defendant to incriminate or tend to incriminate himself of violations of many Federal laws, all of which completely prescribe the activities covered by this Chapter.

[fol. 25] Having determined that the provisions of Chapter 27A of the Internal Revenue Code are in contravention of the Fifth Amendment and require this court to sustain

the motion to dismisss filed herein, the court sees no necessity for discussing at length the other points raised by the the defendant in his Motion to Dismiss, brief and argument. In passing, however, the court feels some comment should be made with respect to the other two questions raised by him.

With respect to the question of whether or not the tax involved is a penalty in the guise of a tax, a serious question is presented by the defendant in this regard. I have read carefully the language of the Supreme Court in the case of United States v. Sanchez, supra, wherein the court stated:

> "Second. The tax levied by Sec. 2590(a)(2) is not Conditioned upon the commission of a crime. The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. Such a transfer is not made an unlawful act under the statute. Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction. The fact Congress provided civil procedure for collection indicates its intention that the tax be treated as such. Helvering v. Mitchell, 1938, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917. Moreover, the Government is seeking to collect the levy by a judicial proceeding with its attendant safeguards. Compare Lipke v. Lederer, 1922, 259 U.S. 557, 42 S. Ct. 549, 66 L. Ed. 1061; Tovar v. Jarecki, 7 Cir., 1949, 173 F. 2d 449."

Appellant United States' Statement as to Jurisdiction, page 5 thereof, filed with the Supreme Court in United States v. Sanchez, supra, reads in part as follows:

> [fol. 26] "There is no liability attached to the transfer of marihuana. It is the failure to pay the tax that gives rise to the criminal liability and not as in *Lipke* v. *Lederer* the criminal liability which creates the tax obligation."

Further, page 8 thereof reads in part as follows:

> "The effect of the ruling below if allowed to stand is to remove all criminal sanctions upon the possession or transfer of untaxed marihuana. The only crime defined by federal law with respect to marihuana is the **possession** or transfer of untaxed marihuana. If the tax imposed is a penalty then the crime of possessing non-tax paid marihuana no longer exists."

Page 27 thereof reads in part as follows:

> "In the present case the tax laid by Section 2590 (a)(2) is not conditioned upon commission of a crime. The tax is upon the transfer of marihuana to a person who has not paid the special tax and registered under Sec. 3230 and 3231. Such a transfer is not made a crime by the statute nor is the tax conditioned upon its being shown that the transfer is made criminal or unlawful by other provisions of law. The only transfers made unlawful by the Act are: (1) A transfer not in pursuance of an official order form (Sec. 2591); and (2) A transfer by a person who has not paid the special tax and registered, Sec. 3234. Acquisition of the drug by any person without having paid the transfer tax is also unlawful, Sec. 2593. It is thus the failure to pay the tax, either the special or transfer tax or the acquisition of the drug without a proper order form, which gives rise to criminal liability and not as in the *Lipke* and *Constantine* cases the criminal liability which gives rise to the tax."

The foregoing quotations reflecting the United States' position and the language of the Supreme Court compel the conclusion that if the Congress had seen fit to make the possession of marihuana a crime the Court would not have sustained the tax as a valid exercise of the taxing power but would have held that since evidence of the commission of [fol. 27] a crime was required before the tax could be imposed, it was a penalty and could not be collected. Quite obviously in the present case evidence of the commission of a crime is called for before the tax becomes owing and due because the tax under Section 3290 is not owing and

due until the person is liable under subchapter (a) of Chapter 27A of the Internal Revenue Code and, if liable, such liability arises only by doing an act in violation of Federal law, thus making it a penalty and not a tax.

With respect to the defendant's argument that by virtue of Section 3275, Title 26, U.S.C. and Section 3283, Title 26, U.S.C. the defendant would be deprived of the protection of the Fourth Amendment, I believe that there is substance to that argument but do not feel required to pass on it in light of all the foregoing.

In concluding, I wish to re-emphasize my strong and always abiding desire to afford the privilege and protection of the Fifth Amendment to those invoking its protection when I believe that the person claiming the privilege has a reason to fear that his actions or statements may tend to incriminate him. Let it never be forgotten that the Fifth Amendment of our Constitution was not adopted to protect the innocent, for the innocent need no such protection. It was adopted to protect those charged with guilt so that they would not be forced to give forth with evidence, documentary or oral, which would bring about their conviction. To say that this defendant, as the United States has said, or any others, engaging in similar activities can avoid the perils of prosecution by refraining from engaging in gambling activities and, accordingly, not be required to register is the purest form of sophistry. This act is supposed to be a revenue raising measure.

Motion to Dismiss granted.

Thomas C. Scalley, Judge.

* * * * * * *

[fol. 28] IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

NOTICE OF APPEAL—Filed August 3, 1953

Name and address of appellant: United States of America.

Offense: Violation of the Occupational Tax Stamp Act, 26 U.S.C. § 3290, 3294 (a), 3294 (c) and 2707 (b).

Brief description of judgment or order: Motion to Dismiss granted.

Date of judgment or order: July 24, 1953.

The United States of America hereby appeals to the Municipal Court of Appeals for the District of Columbia from the judgment or order above mentioned.

(S.) Leo A. Rover, United States Attorney.

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IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

AGREED STATEMENT OF PROCEEDINGS AND EVIDENCE—Filed August 18, 1953

Comes now the United States of America by its attorney, the United States Attorney, and the defendant by his attorneys, Walter E. Gallagher and Myron G. Ehrlich, and make the following agreed statement of proceedings and evidence.

On October 7, 1952, an information was filed against Frank Lewis, the defendant herein, in the Criminal Division of the Municipal Court, wherein it was charged that on December 13, 1951, and on diverse other days thereafter during the month of December, 1951, in the District of Columbia, he engaged in the business of accepting wagers, that by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars ($50.00) as imposed by Section 3290 of Internal Revenue Code, and that he failed to pay the said tax, all in violation of Section 3294(a) Internal Revenue Code; Title 26 U. S. [fol. 29] Code Section 3294(a) and Section 2707(b) Internal

Page

MISCELLANEOUS.

Revenue Code as made applicable by Section 3294(c) Internal Revenue Code. On October 28, 1952, Frank Lewis moved to dismiss the information on the grounds that Chapter 27A of the Revenue Act of 1951 is unconstitutional because its provisions (1) impose penalties in the guise of taxes and (2) require a defendant to be a witness against himself and to incriminate himself in violation of the Fifth Amendment and (3) for other reasons to be brought to the attention of the court at the time of the argument on the motion.

After several continuances, the oral hearing on the motion to dismiss was held on May 21, 1953, at which time defendant by his attorneys raised the additional ground that Chapter 27A of the Revenue Act of 1951 contravenes the Fourth Amendment of the Constitution and filed a Memorandum in Support of Motion to Dismiss. Thereafter the Government filed a written opposition thereto. On July 24, 1953, the trial court granted the motion to dismiss and handed down a written opinion in connection therewith.

(S.) Leo A. Rover, United States Attorney;

* * * * * * *

(S.) Walter E. Gallagher, Myron G. Ehrlich, Attorneys for Defendant.

August 24, 1953.

Approved.

(S.) Thomas E. Scalley, Judge.

IN THE

Supreme Court of the United States

October Term, 1954

No.

FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justices of the United States and the Associate Justices of the Supreme Court of the United States:

Frank Lewis, the petitioner herein respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 10, 1954 (R. 37) affirming a judgment of the Municipal Court of Appeals for the District of Columbia which had reversed a judgment of the Municipal Court for the District of Columbia dismissing an information charging the petitioner with a violation of 26 U.S.C., Section 3290 (Wagering Tax Act) (Chapter 27A, Internal Revenue Code.)

[fol. 30] IN THE MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 1387

UNITED STATES, Appellant,

v.

FRANK LEWIS, Appellee

Appeal from The Municipal Court for the District of Columbia, Criminal Division

(Argued October 5, 1953. Decided November 6, 1953)

Lewis A. Carroll, Assistant United States Attorney, with whom Leo A. Rover, United States Attorney, and William J. Peck, Kenneth D. Wood, and Alexander L. Stevas, Assistant United States Attorneys, were on the brief, for appellant.

Walter E. Gallagher, with whom Myron G. Ehrlich and Joseph Sitnick were on the brief, for appellee.

OPINION

Before Cayton, Chief Judge, and Hood and Quinn, Associate Judges

Cayton, Chief Judge: Frank Lewis was charged by information with having engaged in the business of accepting wagers without paying the occupational tax imposed by Chapter 27A of the Internal Revenue Code, 26 U. S. C. § 3285 *et seq.* (Supp. V, 1952). He moved to dismiss the information and the trial court granted his motion, holding in a written opinion that Chapter 27A is unconstitutional because it compels a defendant to give self-incriminating information and imposes a penalty in the guise of a tax. From that decision the United States has brought this appeal.

Determination of the constitutionality of an act of Congress is, as the Supreme Court has said, one of the most [fol. 31] serious responsibilities of the judiciary. "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United

States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or inadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare." *Nicol* v. *Ames*, 173 U. S. 509, 514.

Much greater has been the unwillingness of courts of first instance to strike down acts of Congress. Out of an awareness of the serious nature of such a procedure and out of a concern for uniform enforcement of federal laws has grown more than a rule of law: a sound and well-defined public policy has been established among the United States District Courts of resolving every intendment in favor of acts of Congress and refraining from nullification of such acts unless some plain mandate of the constitution is clearly shown to have been violated.[1] Thus it has been said: ". . . before pronouncing an act of Congress unconstitutional and unenforceable, a District Court should be even more carefully deliberate and firmly convinced beyond a reasonable doubt of its unconstitutionality than would be necessary on the part of a Circuit Court of Appeals or of the Supreme Court of the United States. A District Court is a one-man court. There are numerous District Courts; and the result of conflicting views of individual District Judges as to the unconstitutionality of acts [fol. 32] of Congress lead to a frequently confusing status in the enforceability of national laws. Wherefore District Courts should be most reluctant to pronounce acts of Congress void. The soundest public policy is conserved when

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[1] La Croix v. United States, W. D. Tenn., 11 F. Supp. 817, *appeal dismissed*, 6th Cir., 85 F. 2d 569; Bemis Bro. Bag Co. v. Feidelson, W.D. Tenn., 13 F. Supp. 153; In re Moore, E.D. Pa., 8 F. Supp. 393; Mather v. MacLaughlin, E.D. Pa., 57 F. 2d 223; United States v. 458.95 Acres of Land, E. D. Pa. 22 F. Supp. 1017.

District Courts do not interfere with the operation of acts of Congress. Pending the final decision of the Supreme Court of the United States, nullification of laws in some districts and their enforcement in other districts leads to much confusion and inequality.'' [1]

To this we would add that a still greater duty of self-restraint rests on courts of limited jurisdiction like the Municipal Court. Such a court should not challenge the right of Congress to make a law unless unconstitutionality is glaring and it is manifest that Congress has exceeded its grant of power.

In applying this test we note first that the wagering tax act here involved has been held valid by a three-judge federal court in this jurisdiction. *Combs* v. *Snyder*, D.C.D.C., 101 F. Supp. 531, *affirmed without opinion*, 342 U. S. 939. Six other district courts have likewise upheld the constitutionality of the same act.[2] And in the only case in which a district court held the act invalid there resulted a reversal by the Supreme Court. *United States* v. *Kahriger*, 345 U. S. 22, *rehearing denied*, 345 U. S. 931. There the highest Court held that the act did not prescribe a penalty or require self-incriminating revelations in violation of the fifth amendment.

Discussing the *Kahriger* decision at length in his opinion, the trial judge found the present case distinguishable. He held compliance with the act would involve self-incrimination, because registration is required only after wagers have been accepted. Therefore, he said, since District of Co- [fol. 33] lumbia laws make the acceptance of wagers a

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[1] La Croix v. United States, *supra*, at 820.

[2] United States v. Penn, M. D. N. C., 111 F. Supp. 605; United States v. Robinson, E. D. Mich., 107 F. Supp. 38; United States v. Smith, S. D. Cal., 106 F. Supp. 9; United States v. Nadler, N. D. Cal., 105 F. Supp. 918; United States v. Forrester, N. D. Ga., 105 F. Supp. 136; United States v. Arnold, Jordon & Wingate, E. D. Va. (No. 478 decided Sept. 18, 1952).

crime,[1] and since such laws are federal laws, one who registers under the act, giving his name and address, and his employees' names and addresses, would necessarily be giving evidence tending to incriminate himself of a violation of federal law. This position is directly contrary to the Supreme Court's ruling in the *Kahriger* case, where it was said: "Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for . . . Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. . . . If respondent wishes to take wagers subject to excise taxes under § 3285, supra, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."[2]

Thus the *Kahriger* opinion construed the act to require registration before entering the business of accepting wagers, and held that such was valid and proper. It was not open to the Municipal Court to adopt a different construction.

The trial court also said "even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one of the conspirators applied for a tax stamp such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction." That statement is answered in the words we have already [fol. 34] quoted from the Kahriger decision to the effect that one who has not registered has no right to claim the constitutional privilege.

The second basis for the decision of the trial court, i.e.,

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[1] Code 1951, § 22-1501 through § 22-1508; 18 U.S.C. § 371 (Supp. V, 1952).

[2] United States v. Kahriger, supra, at page 32.

that the act imposes a penalty in the guise of a tax, is likewise contrary to the holding in *Kahriger*, which, as we have just said, validates the requirement that registration and payment of the tax are necessary before the named business is entered into.

Various other matters and contingencies are discussed in the opinion below, and urged upon us in appellee's brief here, some by way of speculation and others in the form of predictions in terrorem. We consider them to be subordinate to the vital issues we have discussed, and wholly insufficient to support the ruling of unconstitutionality.

Reversed.

IN THE MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JUDGMENT—November 6, 1953

Appeal from the Municipal Court for the District of Columbia, Criminal Division. This cause came on to be heard on the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. In consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, reversed with costs, and that this cause be, and it is hereby, remanded to the said Municipal Court for further proceedings in accordance with the opinion of this Court.

Nathan Cayton, Chief Judge.

[fol. 35] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12009

FRANK LEWIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the Municipal Court of Appeals for the District of Columbia

Decided June 10, 1954

Mr. Walter E. Gallagher, with whom Mr. Myron G. Ehrlich was on the brief, for appellant.

Mr. Lewis A. Carroll, Assistant United States Attorney, with whom Messrs. Leo A. Rover, United States Attorney, and Kenneth D. Wood and Alexander L. Stevas, Assistant United States Attorneys, were on the brief, for appellee.

OPINION—Filed June 10, 1954

Before Edgerton, Bazelon and Washington, Circuit Judges

PER CURIAM:

This is an appeal from a decision of the Municipal Court of Appeals, holding that the occupational tax imposed by Chapter 27A of the Internal Revenue Code, 26 U. S. C. § 3290 (1952), on the business of accepting wagers, is constitutional in its application to the District of Columbia. [fol. 36] *United States* v. *Lewis*, 100 A.2d 40 (D. C. Mun. App. 1953). That decision is clearly correct, in view of *United States* v. *Kahriger*, 345 U. S. 22, rehearing denied, 345 U. S. 931 (1953). "Of course Congress may tax what it also forbids." *United States* v. *Stafoff*, 260 U. S. 477 at 480 (1923).

Affirmed.

[fols. 37-38] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1954

No. 12,009

FRANK LEWIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the Municipal Court of Appeals for the District of Columbia

Before Edgerton, Bazelon, and Washington, Circuit Judges

JUDGMENT—Filed June 10, 1954

This cause came on to be heard on the transcript of the record from the Municipal Court of Appeals, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court of Appeals appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 10, 1954.

Per Curiam.

[fol. 39] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 40] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 203

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8628)